A

Bangi Villa Sdn Bhd v MK Chai Construction Sdn Bhd (formerly known as RKY Forwarding & Transport Sdn Bhd)

HIGH COURT (SEREMBAN) — CIVIL APPEAL NO 12–57 OF 2003

B LOW HOP BING J

27 JUNE 2005

Civil Procedure — Summary judgment — Triable issues — Whether lack of authority of managing director in entering contract amounted to triable issue

C

Contract — Agency — Lack of authority of managing director in awarding contract — Almost complete performance of contract by parties — Whether contract enforceable

Vide a letter dated 15 October 1996, the defendant awarded a contract to the
D plaintiff to supply some earth to fill up the balance area in relation to certain lots of land. The contract sum was RM889,500. The plaintiff had accordingly supplied the earth pursuant to the contract, for which the defendant had made some progress payments, leaving a balance of RM79,500 which was still due and owing by the defendant to the plaintiff. The plaintiff claimed for the sum owing. The sessions court granted summary judgment in favour of the plaintiff.
E The defendant appealed.

Learned counsel for the defendant submitted that the plaintiff had not completed the earthworks or alternatively the contract in question was awarded by one Lawson Kan without the authority of the defendant. For the plaintiff it was alleged that there was no triable issue and so summary judgment had
F been correctly given.

Held, dismissing the appeal with costs:

(1) The contract between the plaintiff and the defendant was for the supply
G of earth to the aforesaid lots, as opposed to earthworks. Further, the contract sums were obviously different. Hence, the defendant's contention in this regard must inevitably fail (see para 7).

(2) In relation to the defendant's submission that Lawson Kan had awarded the contract to the plaintiff without the defendant's authority, it was to
H be noted that the letter of award borne the defendant's letterhead and Lawson Kan had signed as the defendant's managing director. On the other hand, the plaintiff had performed its part of the contractual obligations by supplying the earth in question for which the plaintiff was certainly entitled to payment. Indeed more than 90% of the contract sum had been paid by the defendant to the plaintiff. The defendant
I cannot now say that its managing director had no authority. Even if that were to be the case, the defendant's remedy, if any, lies elsewhere and cannot constitute a triable issue in the instant appeal (see para 8).

[**Bahasa Malaysia summary**

Melalui sepucuk surat bertarikh 15 Oktober 1996, defendan telah mengawardkan satu kontrak kepada plaintif untuk membekalkan tanah untuk mengisi baki kawasan berkenaan beberapa lot tanah. Jumlah kontrak adalah RM889,500. Plaintif seterusnya membekalkan tanah menurut kontrak itu di mana defendan telah membuat pembayaran secara progresif, meninggalkan baki sebanyak RM79,500 yang masih dihutang oleh defendan kepada plaintif. Plaintif menuntut untuk jumlah yang dihutangkan. Mahkamah sesyen membenarkan penghakiman terus memihak kepada plaintif. Defendan merayu.

Peguam yang bijaksana bagi pihak defendan menghujah bahawa plaintif tidak menyiapkan kerja tanah atau secara alternatif kontrak tersebut telah diawardkan oleh satu Lawson Kan tanpa autoriti daripada defendan. Untuk plaintif ia dikatakan bahawa tiada isu-isu yang perlu dibicarakan dan oleh itu penghakiman terus yang dibenarkan adalah betul.

Diputuskan, menolak rayuan itu dengan kos:

(1) Kontrak di antara plaintif dan defendan adalah untuk pembekalan tanah kepada lot-lot yang dinyatakan, dan bukan untuk kerja-kerja tanah. Lagipun, jumlah kontrak-kontrak itu adalah dengan jelas tidak sama. Oleh itu, penyataan defendan berkenaan ini semestinya gagal (lihat perenggan 7).

(2) Berhubung dengan penghujahan defendan bahawa Lawson Kan telah mengawardkan kontrak kepada plaintif tanpa autoriti defendan, patut diambil perhatian bahawa surat itu mengandungi letterhead defendan dan Lawson Kan telah menandatangani sebagai Pengarah Pengurusan defendan. Sebaliknya, plaintif telah melaksanakan obligasi kontraktualnya dengan membekalkan tanah tersebut untuk mana plaintif sememangnya mempunyai hak untuk pembayaran. Lagipun lebih daripada 90% jumlah kontrak telah dibayar oleh defendan kepada plaintif. Defendan tidak boleh sekarang menyatakan bahawa Pengarah Pengurusan mereka tidak mempunyai autoriti. Sekalipun kes adalah seperti demikian, remedi bagi defendan, jika ada, adalah remedi lain dan tidak ada isu-isu yang perlu dibicarakan dalam rayuan ini (lihat perenggan 8).]

Notes

For cases on triable issues, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6103–6173.

For cases on agency generally, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2112–2130.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)

Pembinaan V-Jaya Sdn Bhd v Binawisma Development Sdn Bhd [1987] 2 CLJ 446 (refd)

Legislation referred to

Subordinate Courts Rules 1980 O 26A

Appeal from: Summons No 52–596 of 2001 (Sessions Court, Seremban)

Asmawi Ismail (SF Leow & Co) for the plaintiff.
Conrad Young (Sivanathan) for the defendant.

Low Hop Bing J:

I APPEAL

[1] This is an appeal by the appellant/defendant ('the defendant') against the decision of the learned sessions court judge who had on 19 November 2003 entered summary judgment in the sum of RM79,500 together with interest and costs in favour of the plaintiff under O 26A of the Subordinate Courts Rules 1980.

II FACTUAL BACKGROUND

[2] Vide letter dated 15 October 1996, the defendant awarded a contract to the plaintiff to supply 107,000 cubic metres of earth to fill up the balance area left behind by the defendant's former contractor in relation to lots 1321 to 1331, 1476 to 1478 and 1832 in the mukim of Kajang, district of Hulu Langat, Selangor.

[3] The contract sum was RM889,500. The plaintiff has accordingly supplied the earth pursuant to the said contract, for which the defendant has made some progress payments, leaving a balance of RM79,500 which was still due and owing by the defendant to the plaintiff, the particulars of which have been rendered by the plaintiff to the defendant.

III ANY TRIABLE ISSUE ?

[4] Mr Conrad Young, learned counsel for the defendant, referred to exh YHT1 at pp 55 to 58 of the appeal record and submitted that the plaintiff had not completed the earthworks or alternatively the contract in question was awarded by one Lawson Kan without the authority of the defendant.

[5] For the plaintiff Mr Asmawi Ismail responded that there is no triable issue and so summary judgment had been correctly given.

[6] In the light of the aforesaid submissions based on the parties' respective affidavits and pleadings, I shall refer to the majority judgment of the then Supreme Court delivered by Mohamed Azmi SCJ (as he then was) in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, at p 408 D–F which merits reproduction as follows:

Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable.

[7] In my judgment, the defendant's reference to earthworks as in exh YHT 1 at pp 55 to 58 of the appeal record must be tested against the contract in question which is for the supply of 107,000 cubic metres of earth to the lots as alluded to above. That reference is obviously different as it was a contract for earthworks entered into between the defendant and another party (not the plaintiff herein). In that contract for earthworks, the claim for the first progress payment was for RM1,530,000 which has no relevance whatever to the subject matter before me. The contract between the plaintiff and the defendant is for the supply of earth to the aforesaid lots, as opposed to earthworks. Further, the contract sums are obviously different. Hence, the defendant's contention in this regard must inevitably fail.

[8] In relation to the defendant's submission that the said Lawson Kan has awarded the contract to the plaintiff without the defendant's authority, it is to be noted that the letter of award bears the defendant's letterhead and Lawson Kan had signed as the defendant's managing director. On the other hand, the plaintiff has performed its part of the contractual obligations by supplying the earth in question for which the plaintiff is certainly entitled to payment. Indeed more than 90% of the contract sum has been paid by the defendant to the plaintiff. The defendant cannot now say that its managing director has no authority. Even if that were to be the case, the defendant's remedy, if any, lies elsewhere and cannot constitute a triable issue in the instant appeal.

[9] A substantially similar situation arose in *Pembinaan V-Jaya Sdn Bhd v Binawisma Development Sdn Bhd* [1987] 2 CLJ 446, where in a contract for earthworks and turnkey project, the summary judgment entered for the plaintiff was upheld on appeal to judge in chambers. There the letter of undertaking was written on the defendant's letterhead and addressed to the plaintiff. It was acknowledged by the directors of both parties following a meeting they had between them. Siti Norma J (now CJ (M)) held, *inter alia*, that:

… The defendant cannot now disclaim liability by stating that it was written without the consent of its Board of Directors. So long as it is written by somebody with authority in the defendant's company, it must be presumed that he had the necessary authority to commit the defendant company to any contractual obligations. It is hardly expected that anybody dealing with a company should question the authority of every person representing such a company, unless of course it is plain and clear that such a person had no authority to make any commitment on behalf

of the company. In this case, a person of no less standing than a director of the defendant company had signed on the letter of undertaking and since the subject matter was known to both parties, I consider that there is no merit to the defendant's objection that the letter of undertaking was wrongfully written.

IV CONCLUSION

[10] On the foregoing grounds, I affirm the decision of the court below in entering summary judgment in favour of the plaintiff and hold that this appeal being wholly without merits is hereby dismissed with costs.

Appeal dismissed with costs.

Reported by Loo Lai Mee